

Post-conception advice services

BCAP Consultation

BCAP Consultation Document
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1. Statement of clarification and consultation on BCAP's proposals for the regulation of advertisements for post-conception advice services

The Broadcast Committee of Advertising Practice (BCAP) is the body responsible for setting, reviewing and revising the rules for broadcast advertising, presently collected in the BCAP Code and previously provided in the old BCAP Codes.¹

Ofcom has statutory responsibility, under the Communications Act 2003 ("The Act"), for maintaining standards in TV and radio advertisements. Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in 2004.

On 26 March 2009 BCAP launched a public consultation inviting responses to its proposed revisions to the old BCAP Codes.² More than 29,000 responses to the consultation were received, many of which focused on the fact that BCAP had proposed to change the regulatory position on advertisements for post-conception advice services ("PCAS") [see "Family Planning Centres", pages 90-91, full BCAP Code Review consultation document – and also pages 5-6 below for discussion of the terms "PCAS" and "Family Planning Centres"]. Some respondents objected to what they understood to be the effect of BCAP's proposals, namely that they would allow, for the first time on British TV, advertisements for services that carry out abortions. In fact, there was currently nothing to prevent many PCAS, including those that offer terminations as an option, from advertising on TV or radio under the old Codes. While it is true that some services would be able to advertise on TV and radio for the first time under the proposal (see below), BCAP's primary intent was to ensure that advertisements for PCAS do not mislead about the service they offer.

BCAP decided to remove and postpone consideration of the issues relating to PCAS from the general analysis of responses to the consultation, with the aim of consulting separately on PCAS after the remainder of the Code had been published. The new UK Code of Broadcast Advertising, which came into force on 1 September 2010, therefore continues to reflect unchanged the regulatory limitations on the advertising of PCAS on TV and radio that were already in place in the old BCAP Codes.

This document sets out BCAP's new consultation on its proposed changes to the rules for the advertising of PCAS. It clarifies the position of relevant services under the current rules and the effect of the proposed changes. This is to ensure that respondents are given an opportunity to comment on the proposals and respond to this consultation in a fully informed way.

¹ The BCAP Television Advertising Standards Code, the BCAP Rules on the Scheduling of Television Advertisements, the BCAP Radio Advertising Standards Code and the BCAP Advertising Standards Code for Text Services ('the old BCAP Codes').

² <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx>

2. BCAP's current position

Those PCAS that are run on a not-for-profit (charitable) basis are already permitted to advertise on TV and radio subject to certain restrictions such as NHS or local health authority approval or the ability to demonstrate appropriate credentials. However, commercially-based PCAS are currently prevented from advertising on television by the general rule prohibiting advertising for commercial services offering individual advice on personal or consumer problems. Commercial and charitable family planning centres (FPC) may currently advertise on radio, but only if they have appropriate local authority or NHS approval.

Summary of BCAP's proposals

BCAP proposes to change the current advertising rules by introducing the following changes:

- Removing the television rule preventing commercial services offering personal advice from advertising.
- Removing the radio rule permitting advertising only by those FPCs with local authority or NHS approval.
- Introducing a new rule applying to both television and radio requiring medical and health advice services to provide suitable credentials before being able to advertise.
- Introducing a new rule to require services offering post-conception advice on pregnancy that do not directly refer women for a termination to make that fact clear in their advertisements.

The effect of these proposals would be to allow more types of PCAS to advertise on radio and TV. At the same time there would be increased transparency in relation the exact nature of the PCAS provided, namely whether the service would not refer women for a termination.

3. Background information about post-conception advice services (PCAS)

General

PCAS offer a range of services to women, including for example advice on health and well-being, provision of ultrasound services, as well as advice about women's choice to continue with their pregnancy or to have a termination. PCAS are made available to the public in a number of ways and through a variety of different organisations. For example, PCAS can be provided:

- by remote (e.g. by telephone) or face-to-face means;
- as part of a multi-disciplined operation (e.g. a GP surgery, an NHS clinic or hospital, a private or charitable sexual health clinic, including those that offer treatment for termination of pregnancy) or as a dedicated unplanned pregnancy advice service;
- through a national or local health authority, charitable and/or faith based organisation, private enterprise etc.

Which categories of PCAS are subject to statutory regulation?

PCAS subject to the Health and Social Care Act 2008

The Health and Social Care Act 2008 requires organisations to be registered with the Care Quality Commission (CQC) if they provide certain services,³ including family planning services. Family planning services encompass a wide range of pre-conception services (e.g. advice on contraception) and PCAS.⁴ BCAP understands that a PCAS, which offers only counseling / advice, would not require registration with the CQC under the Health and Social Care Act 2008. However, a PCAS which offered other services such as ultrasound scanning for gestational assessment; taking blood for diagnosis; inserting or removing Intrauterine Contraceptive Devices etc, would be required to register with the CQC. Regulated activities that require registration are described in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2009.

PCAS on the register of approved Pregnancy Advice Bureaux

The Secretary of State for Health maintains a register of approved Pregnancy Advice Bureaux ("PAB", plural PABx),⁵ which provide post-conception services. The Secretary of State also has a responsibility under the Abortion Act 1967 to approve private sector places for the purpose of treatment for termination of pregnancy. These approved places may only accept patients referred from an approved PAB, GP or NHS clinic/hospital.

A PAB must comply with a set of Required Standard Operating Principles.⁶ In particular, every woman must:

- have a pregnancy test as appropriate;
- be fully informed about the choices available to her – including alternatives to a termination;
- have the opportunity to receive information on pregnancy matters;
- receive impartial advice on the termination options that are available to her;
- be given advice on contraceptive needs.

³ <http://www.cqc.org.uk/guidanceforprofessionals/introductiontoregistration/whoneedstoregister.cfm#3>

⁴ <http://www.nhs.uk/chq/Pages/839.aspx?CategoryID=54&SubCategoryID=138>

⁵ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4005566

⁶ http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4084699.pdf

The Code of Practice by which PABx must abide sets out the level of service that approved places and registered bureaux in the private sector can expect from the Department of Health including:

- impartial and fair treatment of applications
- prompt response to enquiries
- clear, concise and unambiguous information and advice
- responsibility to uphold the Secretary of State's principles
- independent review of complaints about the treatment of applications
- value for taxpayers' money in the application of regulations

4. The law relevant to the advertising of treatments for the termination of pregnancy

Some respondents to BCAP's original proposal on advertisements for PCAS suggested that the advertising of PCAS is illegal. They considered that advertisements for PCAS indirectly promote treatments for the termination of pregnancy (abortions), which they understood to be illegal. BCAP understands:

- The Abortion Act 1967, as amended by the Human Fertilisation and Embryology Act 1990 (which applies only to England, Wales and Scotland), provides a defence for abortions in some circumstances.
- In Northern Ireland the circumstances in which terminations may be performed are very limited and exceptional (under the Offences Against the Persons Act 1861(OAPA)), and the regime is more restrictive than in Great Britain.

If the proposal is adopted, BCAP would recommend that broadcasters and advertisers of PCAS (particularly those that form part of a multi-disciplinary practice offering treatment for the termination of pregnancy) seek legal advice before advertising. If an advertiser considers it is unable to refer women for a termination for legal reasons, the proposed new rule will require it to say so.

[11.x] Advertisements for services offering advice on unplanned pregnancy must make clear in the advertisement if the service does not refer women directly for a termination. Given that terminations are lawful only in some circumstances, and are subject to particularly stringent requirements in Northern Ireland, advertisers may wish to seek legal advice before advertising.

5. The existing BCAP TV and radio rules that are most relevant to advertisements for PCAS

Radio

The BCAP Code states:

11.11.1

Radio only – Advertisements for family planning centres are not acceptable unless the family planning centre has been approved by a Local Health Authority, the Central Office of Information or other appropriate NHS body.

11.11.2

Radio Central Copy Clearance – Radio broadcasters must ensure advertisements for family planning centres are centrally cleared.

Rule 11.11.1 relates to advertisements for family planning centres, which offer a range of services including PCAS. Only family planning centres approved by a Local Health Authority or other appropriate NHS body can advertise on radio. The rule refers to the Central Office of Information (COI)⁷ because the COI works with government departments and the public sector to produce information campaigns on issues from health and education to benefits, rights and welfare. In light of the COI's role, the Radio Advertising Clearance Centre, the body that clears radio advertisements for broadcast, has traditionally interpreted the rule as permitting advertisements for issues related to family planning from the COI.

In practice, only family planning services that form part of the NHS or are registered with the Department of Health (as Pregnancy Advice Bureaux) or regulated by the Care Quality Commission are presently permitted to advertise on radio. Such services include NHS services, BPAS and Marie Stopes but exclude, for example, PCAS run by or in association with faith based organisations, for example The Good Counsel Network, Brixton Pregnancy Advice Centre and Tyneside Pregnancy Advice Centre.

Because a family planning centre (including a PCAS) amounts to a service or a clinic offering advice or treatments in medical or personal welfare or other health matters, radio advertisements for them must also comply with rule 11.13.⁸ This rule ensures that only those services or clinics that can demonstrate relevant credentials can advertise on TV and radio.

Television

The BCAP Code states:

11.11.3

Television only – Advertisements for commercial post-conception advice services offering individual advice on personal problems are not acceptable

In practice, the TV rules already allow a wide variety of PCAS to advertise. The majority of PCAS are not-for-profit and/or charitable services, which are not prohibited under rule 11.11.3. Such services

⁷ <http://coi.gov.uk/>

⁸ 11.13 Broadcasters may accept advertisements for services offering remote personalised advice on medical or health matters only if all staff providing that advice are suitably qualified and subject to regulation by a statutory or recognised medical or health professional body and the advice given is in accordance with its relevant professional codes of conduct (see rule 11.9).

include NHS services, BPAS, Marie Stopes, PCAS run by or in association with faith based organisations for example The Good Counsel Network, Brixton Pregnancy Advice Centre and Tyneside Pregnancy Advice Centre, but would exclude PCAS that are 'commercial'. This is not necessarily synonymous with, but is likely to cover, profit-making PCAS.

General requirements for radio and television

Both the present Code and the old BCAP Codes contain general rules that require advertisements not to be harmful, offensive or misleading. Those requirements stem from the Communications Act which sets out provisions aimed at securing standards for broadcast advertisements.⁹ BCAP, in performing the co-regulatory functions conferred on it by Ofcom, has the power to exclude advertisements and forms and methods of advertising whether generally or in particular circumstances, if that is necessary to achieve the Communications Act's standards objectives.

Because some PCAS are also registered charities, TV and radio advertisements for them are subject to the rules that regulate charity advertisements. Those rules require, amongst other things: that a charity must be registered (or officially recognised) before they can advertise and must handle with care and discretion any subjects that are likely to arouse strong emotions.

⁹ 319 (2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

6. BCAP's proposals including a new rule for advertisements for PCAS

In reviewing the old BCAP Codes and the restrictions that were indirectly placed on advertisements for PCAS BCAP weighed up, on the one hand, the need to protect vulnerable people who see the advertising for PCAS and, on the other, the right of all categories of PCAS to advertise their legally available services. These services include PCAS that do not refer women for a termination, some of which may take an ethical stance against termination. Such PCAS may currently advertise on TV but most¹⁰ cannot currently advertise on radio.

Television

As proposed in the March 2009 consultation, the prohibition on the television advertising of commercial services offering individual advice on personal or consumer problems has been removed, except with reference to commercial PCAS offering individual advice on personal problems, which are covered by rule 11.11.3 (see page 8 above).

In place of the prohibition, to ensure that audiences, including in particular those who might turn to these services for advice, are offered adequate protection from services offering individuals personal advice, is BCAP's new broadcast rule 11.9:

**11.9
Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters**

Advertisements are acceptable only if the advertiser can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of their skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

Under BCAP's proposal, rule 11.11.3 would be removed and commercial PCAS would be able to advertise on TV for the first time, subject to the requirements of rule 11.9.

Radio

Under BCAP's proposal, rule 11.11.1, which permits advertisements for family planning services only from certain centrally approved organisations (see page 8 above), would be removed. The removal of rule 11.11.1 is possible because of the protection afforded by rule 11.9 for both radio and television.

Protection afforded by other rules in the Code

BCAP considers that members of the audience who might be seriously offended by the nature of advertisements for family planning services and PCAS are afforded adequate protection under:

- the new rule 11.9
- the general Code rules that guard against misleadingness, harm and offence
- the requirement that advertisements are suitably and sensitively scheduled in line with the principle at the head of Section 32 (Scheduling) and broadcast rule 32.1:

¹⁰ See page 8.

Principle

Broadcasters must take special care when scheduling advertisements that might be unsuitable for children or young persons or the audience of religious programmes or for broadcast around sensitive programming or news items.

32.1

Broadcasters must exercise responsible judgement on the scheduling of advertisements and operate internal systems capable of identifying and avoiding unsuitable juxtapositions between advertising material and programmes, especially those that could distress or offend viewers or listeners.

BCAP recognises that advertising for family planning services has the potential to cause serious offence to viewers and listeners, especially those with particular moral or religious convictions, no matter that many PCAS are advisory only. BCAP acknowledges that some viewers and listeners may associate all family planning services with the treatments to terminate pregnancy that a limited number of PCAS provide. BCAP considers family planning services, both commercial and non-commercial, that can provide suitable credentials in line with rule 11.9 and which meet the general requirements of the Code have a legitimate right to advertise their services on TV and radio. BCAP does not assume a moral standpoint on the termination of pregnancy. Those services that provide terminations are not for BCAP to comment on, nor are the circumstances in which women use such services.

BCAP has a responsibility to ensure that vulnerable members of the audience are protected and are not misled by the advertising of these services. BCAP considers women who are or might be pregnant and in the early stages of a pregnancy are particularly vulnerable and that advertisements offering post-conception advice ought to be prepared with a sense of responsibility for that reason and its proposed new rule is formulated to that end.

Proposed new rule specifically for PCAS

Under the proposed Code rule, commercial family planning services as well as not-for-profit/charitably-based services will be able to advertise on TV and radio, subject to the general and specific rules.

BCAP considers it is important that advertisements offering advice to women on pregnancy make clear when the advertised services do not refer women for a termination, should the woman wish to consider that option. The Royal College of Obstetricians and Gynaecologists advises that the earlier in pregnancy a termination is performed the lower the risk of complications¹¹ to the woman. Furthermore, the Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967¹² recommended: 'to ensure that no patients are misled, we ... recommend that the Government consider ways of ensuring that all those claiming to offer pregnancy counselling services ... indicate clearly in their advertising that they do not support referral for abortion.' In light of these two points, BCAP considers there is therefore a strong case on public health grounds to introduce a rule requiring advertisements to make clear if the advertised service does not include referral for termination of pregnancy.

The proposed rule reads:

[11.x] Advertisements for services offering advice on unplanned pregnancy must make clear in the advertisement if the service does not refer women directly for a termination. Given that terminations are lawful only in some circumstances, and are subject to particularly stringent requirements in Northern Ireland, advertisers may wish to seek legal advice before advertising.

As noted in the Background Information, there is a broad range of post-conception advice offered by individual services, including but not limited to unplanned pregnancy advice. Other services might

¹¹ (2.16) <http://www.rcog.org.uk/files/rcog-corp/uploaded-files/NEBInducedAbortionfull.pdf>

¹² <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmsctech/1045/1045i.pdf>

include advice on home births, for example. BCAP considers that it would be disproportionate to extend to all post-conception advice services the requirement to make clear if they do not refer women directly for a termination when some of those services may not be concerned with unplanned pregnancy at all. The reworded proposal is intended to make clear the proper scope of the rule, which is any service offering advice on unplanned pregnancy.

The proposed rule employs the term “directly” to distinguish those services that may refer women for treatment, such as registered PABx (see Background Information above), from those that do not. Some respondents to BCAP’s original consultation on PCAS during the Code Review argued that the proposed rule was unnecessary, on the grounds that women who visited a PCAS that did not refer for termination could, after receiving advice on alternative options, decide that they nevertheless wished to seek termination of their pregnancy and use another service to that end. As explained above, BCAP’s proposal is based on the principle that a pregnant woman should be afforded information at the earliest stage on whether a service does not include referral for termination of pregnancy, to minimize the risk of complications should she decide to seek a termination. The rule seeks to distinguish between services on that basis.

The social and economic impact of the proposals

In proposing changes to current regulation, BCAP conducted an assessment of the likely economic and social impact of the proposals on both consumers and stakeholders.

BCAP has made its assessment bearing in mind, in particular, the following:

- that the key issues are whether present restrictions on advertisements for post-conception advice remain proportionate and whether some advertisements have the potential to mislead vulnerable consumers, leading to harm unless key information is provided;
- that the specific consumer interest in question is that of pregnant women, considered as a potentially vulnerable audience of advertisements for post-conception advice services. The sensitivity of advertising such services among segments of the viewing audience has also been taken into account;
- that BCAP has a delegated statutory duty to prevent the inclusion of advertising that may be misleading, harmful or offensive in TV and radio services;
- that BCAP should consider the impact of no new intervention. The proposal involves both the withdrawal of some existing restrictions and the introduction of a new rule;
- that the impact of all such interventions has been assessed; and
- that all relevant stakeholders likely to be affected should be identified.

In summary, BCAP noted that given that a wider range of PCAS would be able to advertise as a result of the proposals, the change could result in a higher overall volume of such advertising appearing on television and radio, which may in turn impact on the way audiences respond to such advertising. The principal change effected by the proposals is aimed at delivering greater clarity about the services being advertised in order to ensure that audiences are better informed. As such they should not have an adverse impact on audiences (who will be better protected) or a direct quantifiable impact on stakeholders advertising these services.

Social impact

BCAP has considered the likely impact of the proposal to remove the restriction on commercial PCAS on audiences, including members of the public who might wish to avail themselves of the services being advertised and the more general audience.

BCAP considers that the social impact of the proposed new rule (to require PCAS that do not refer for abortion to say so in their advertisements) will be further protection for those members of the public who might wish to avail themselves of the services being advertised by ensuring that there is transparency about what is being offered (see the explanation on pp.11 and 12) and the prevention of avoidable delays in giving advice and/or treatment to those women who may wish to consider

termination as an option. The need for transparency in describing the services advertised also accords with the requirement under the Communications Act 2003 (as amended) that standards are set and applied to prevent the inclusion in broadcast services of advertising that is misleading.

BCAP does not know how many new advertisers might take advantage of the proposed less restrictive regimes on television (commercial services) and radio (no longer limited to approved bodies), or how much advertising they might place should the current proposals be adopted. Nonetheless the proposals taken as a whole do have the potential to increase significantly the amount of PCAS advertising broadcast on television and radio and thus to affect audience perception of the issues.

This could have a number of consequences, none of which are in BCAP's opinion readily measurable, such as:

- an increase in the number of people availing themselves of the advice provided by these services;
- a greater public understanding in relation to pre- and post-conception issues;
- a possible shift by audiences towards using particular PCAS providers;
- the possibility that should the availability of PCAS services gain a higher profile as a result of more advertising, a proportion of the audience may be significantly offended, particularly those who have moral or religious objections to terminations.

In terms of the audience more generally, the original Code consultation in March 2009 elicited a large number of responses (some 27,000) from people who stated that they were offended by the proposals, in many cases based on religious or moral grounds. However, the nature of the majority of those responses indicated that:

most respondents appeared to have misunderstood what was being proposed, believing that an outright ban on the advertising of all PCAS in all broadcast media was being lifted and that for the first time "abortion services" would be able to be advertised on television;

many respondents were registering an in-principle objection to the legal availability of abortions generally and to the advertising of family planning and post-conception services in particular. This meant that few respondents commented on the specific question of whether it is appropriate to allow a broader range of PCAS (including commercial services) to advertise and whether it is sensible to require services that do not refer for termination to say so.

That advertising for PCAS is likely to be offensive to certain members of the audience was demonstrated last year by a television advertising campaign by one charitable organisation offering post-conception advice¹³ which attracted a substantial number of complaints about the alleged advertising of abortion, even though the advertisement made no mention of terminations. While BCAP must accept that some segments of the audiences are always likely to be offended by the advertising of PCAS, BCAP has no proposals to introduce a ban on such advertising, although that is what many of those who have contacted BCAP appear to want.

BCAP must take into account that these are legally available services offering a range of advice and that providers should be permitted an appropriate level of freedom of expression to advertise. In seeking to ensure an appropriate level of freedom of expression in this case, BCAP has taken into account that restrictions on such freedom should only be those prescribed by law and necessary for the protection of health or morals, as is provided for in Article 10 (2) of the European Convention on Human Rights¹⁴.

While the protection of morals has particular relevance for rules on offence, offence taken by some members of the audience is not in itself sufficient reason to prohibit a particular category of advertising, and a distinction must be borne in mind between categories of advertising and the content of advertisements. The current statutory regime for broadcasting standards under the Communications Act 2003 requires that generally accepted standards be applied to the content of advertising to provide

¹³ Marie-Stopes International advertised on television in April-May 2010 - the first campaign of its kind

¹⁴ <http://www.hri.org/docs/ECHR50.html#C.Art10>

adequate protection for members of the public from the inclusion of offensive or harmful material. This does not mean that audiences should never be offended but rather that they should be adequately protected from potentially offensive material, taking into account that there are likely to be sections of the audience who wish to view material or to be informed by advertising which others may consider offensive.

There are already a number of rules in place in the BCAP Code to ensure that generally accepted standards are applied to provide adequate protection from offensive or harmful material and taking into account the spirit rather than the letter of the rules. If the current proposals on the advertising of PCAS are adopted, broadcasters and advertisers would have to exercise common sense and care in both the scheduling and the content of such advertisements to avoid causing offence, for example by the unsuitable juxtaposition of advertising and programme material, in line with the requirements of section 32 (Scheduling).

BCAP has also considered the social impact of not removing the restriction on commercial PCAS from advertising on TV and radio. It noted that it would remain possible for PCAS to be advertised on radio, subject to appropriate approval from an NHS body or local authority, so that maintaining the rules would not prevent consumers from being exposed to PCAS advertising altogether as some respondents believed to be the case in their responses to the original consultation. BCAP has considered that some consumers could remain concerned by the advertisement of approved PCAS on radio.

When considering this option, BCAP was mindful of the limited number of PCAS advertised on radio and that the ASA had not received any complaints about advertisements for these services on radio. BCAP considered that those factors indicated that maintaining the existing rule would be unlikely to cause consumers additional concern.

With regard to television, BCAP considered that maintaining the rule could have an adverse social impact in so far as it would prevent consumers from being offered legally available services and would preclude them from learning of those services in a medium which might be of appeal to them. Furthermore, BCAP considered that maintaining the existing rule meant that women were limited in the choice of PCAS services being advertised to them which, although difficult to quantify, might affect choice adversely. BCAP therefore considers that maintaining the existing rules could have an adverse social impact.

Since, as discussed above, it has proved difficult to isolate from the 'in principle' objections to PCAS being advertised on TV and radio, what the impact of BCAP's proposals might be for audiences, in this new consultation BCAP would particularly welcome comments focused specifically on the proposals as clarified in this document and on their likely social impact.

Economic impact

When considering the likely impact of the proposed rule changes, three different categories of potential PCAS advertisers are relevant:

- (1) non-commercial (charitable) services who have always been permitted to advertise under the current rules on television;
- (2) commercial services offering post-conception advice that, to date, have not been permitted to advertise on television;
- (3) all PCAS, other than those family planning centres approved by a Local Health Authority, the Central Office of Information or other appropriate NHS body, that have, to date, been prohibited from advertising on radio.¹⁵

Overall, BCAP considers that the proposals may encourage a larger number of PCAS providers to advertise their services, and create a more competitive advertising market for these services in the interests of consumers. In relation to the first category of provider (non-commercial (charitable) services who are permitted to advertise under the current rules on television), BCAP does not anticipate that there would be any significant adverse economic impact stemming from the proposals.

¹⁵ See page 9 for a detailed explanation of which not-for-profit organisations are currently permitted to advertise on radio.

This category is already permitted to advertise and the only additional regulatory requirement on them would be that they must state in their advertisements if they do not refer for termination (see pages 8-9).

For the second category of advertisers (the commercial bodies providing PCAS that would be able to advertise for the first time on television) the proposals would allow a potentially large number of small private clinics and medical services, as well as larger well-known commercial organisations, to advertise for the first time.

However, as already noted, no such service providers specifically identified themselves to BCAP in the public consultation on the BCAP Code in March 2009 as bodies which were likely to advertise (or have any intention of advertising) their services on television or radio. BCAP is therefore unable to quantify what the likely economic impact on these stakeholders would be if the proposals are adopted. However, it is likely that the impact on any who did advertise would be positive rather than negative, given that they would be likely to benefit from the new opportunities to advertise their services and potentially receive more enquiries from the accompanying increased publicity.

The proposal to lift the radio prohibition on advertising for those services falling into the third category (all PCAS, other than those family planning centres approved by a Local Health Authority, the Central Office of Information or other appropriate NHS body, that have, to date, been prohibited from advertising on radio) would enable a wide range of PCAS to advertise on radio for the first time. Given the relatively low cost of radio advertising it is likely that if the proposals to liberalise were adopted, a number of organisations might take advantage of the change in the rules. However, as with the commercial PCAS referred to above, BCAP has no information which enables us accurately to estimate how many of these organisations would choose to advertise on radio. It is therefore not possible to gauge with any accuracy the impact of the change on them in terms of costs and benefits. There could however, be a modest revenue benefit to radio broadcasters if there is a demand for advertising time from what would in effect be a new category of advertiser.

BCAP has also considered the likely economic impact of not changing the existing rules. It envisages that a limited number of PCAS would still advertise on radio, which might have a continuing detrimental economic impact on commercial PCAS who could not advertise their services. Some PCAS that could advertise on radio would not be able to take advantage of TV as a medium because of the existing rules and so they too would suffer a continuing detrimental economic impact. Because BCAP is unable to quantify the likely number of advertisers who will advertise if the restriction on commercial PCAS was lifted, it is impossible to ascertain how many commercial PCAS the rule currently precludes from advertising. BCAP welcomes specific comments from potential advertisers on that point. However, BCAP remains of the view that maintaining the existing rules which preclude PCAS providers from advertising their legally available services to a wider audience would be a disproportionate restriction on PCAS providers' freedom of expression.

In summary, BCAP does not envisage any direct significant adverse social or economic impact on PCAS overall stemming from the proposed changes, and is not in a position to comment on what are likely to be the specific advantages or disadvantages for the different categories of PCAS, or the indirect effects of such changes. However, the new opportunities to advertise presented to commercial PCAS on television and to the faith-based and charitable PCAS on radio could provide some economic or business benefits to them and enhance the public's choice.

BCAP welcomes responses to this consultation from relevant stakeholders and invites potential advertisers to indicate whether they are likely to consider advertising their services on television or radio. If so, it would be helpful if they could offer comment specifically on the likely economic and/or practical impact of these rule changes on them so that these can be taken into account before deciding whether or not to adopt the current proposals.

7. Responding to this consultation

Consultation Question:

Do you consider that the proposals taken as a whole including the new rule 11.x constitute proportionate measures to balance the freedom of legally available family planning services to advertise with the need to provide women with appropriate information to make informed choices about options available in cases of unplanned pregnancy and to provide adequate protection for vulnerable people?

BCAP invites interested parties to comment on its revised proposals. Written responses to this consultation should be received by no later than close of business on 08/08/2011. As indicated above, respondents to the 2009 consultation may be assured that BCAP will reconsider the comments they made then on the previous proposals (unless any respondent requests us in writing not to take their previous response into account). Accordingly, you need only write a second time should you feel that your understanding of the proposal has changed in light of the information provided here.

You are particularly encouraged to respond to this statement if:

- your views are not reflected in the Background Information document or;
- you did not respond to the original proposal and you have, or the organisation you represent has, interests which are particularly relevant to the proposal under consideration.

For a summary of significant points made in relation to BCAP's original proposal please see Annex B.

Please send your response to arrive at BCAP no later than 8 August 2011.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses. Please send your response to codepolicy@cap.org.uk.

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

Code Policy
Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, www.cap.org.uk, usually within three months of the end of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by e-mail or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts can be published with your identity. Confidential responses will be included in any statistical summary of the number of comments received.

8. Annex A – Regulatory framework in broadcast advertisements

The Communications Act 2003 extends to Northern Ireland and section 319(2) provides that the standards directives for the Broadcasting Code include “(a) that persons under the age of eighteen are protected (b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services... (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented...”

Directive 89/552/EEC as amended (the Audio Visual Media Services Directive) provides for home authority control (subject to various exceptions) in the case of broadcasts within the EU, but it only applies as between EU member states, not within member states.

The Consumer Protection from Unfair Trading Regulations 2008, provide that stating or otherwise creating an impression that a product can legally be sold when it cannot” is unlawful and a criminal offence. Product includes a service. Promoting an unlawful practice through a Code of Conduct is itself unlawful, although not a criminal offence. Even if advertising post-conception advice services would constitute a commercial practice within the Regulations it would not itself be advertising a service that cannot be legally sold.

The Medicines (Advertising) Regulations 1994, specifically Regulation 6(3) states: “No person shall issue an advertisement which is likely to lead to the use of a relevant medicinal product or any other medicinal product, substance or article for the purpose of inducing an abortion in women.” It is the legal status restrictions that prevent medicines licensed for abortion being promoted to the public rather than Reg 6(3). The reason they can't be advertised to the public is because they are prescription only medicines and Regulation 7 prohibits advertising POMs to the public.

Advertising a service, part of which may result in the issuing of a product for inducing an abortion, does not in itself mean that the ad will likely lead to the use of that product.

Enforcement

Ofcom-licensed television and radio broadcasters are responsible for ensuring that the advertisements they carry comply with the BCAP Codes. If it considers that a BCAP Code has been breached, the ASA can require the broadcaster not to repeat the advertisement in its present form. On those rare occasions that a broadcaster continues to broadcast an advertisement that the ASA has found in breach of a BCAP Code, the ASA can refer the broadcaster to Ofcom, which can impose statutory sanctions on the broadcaster. Ofcom can fine broadcasters and, in extreme cases, revoke the broadcaster's licence. For more information on the ASA's complaint handling procedure, go to www.asa.org.uk and for Ofcom's outline procedures for statutory sanctions go to www.ofcom.org.uk.

General Policy Objectives

The old BCAP Codes require that advertisements must comply with the law and broadcasters must make that a condition of acceptance. In addition, broadcasters must comply with the rules in the relevant BCAP Code, which can promote compliance with the law by reflecting legal requirements that are especially relevant to advertising. Broadcasters should feel confident that the old BCAP Codes do not endorse practices that are illegal or otherwise undermine the law.

Non-broadcast advertisements

Non-broadcast advertisements are regulated by the ASA under the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code).

The Committee of Advertising Practice (CAP), the self-regulatory body that created, revises and enforces the CAP Code will consider any changes that BCAP makes as a result of this consultation.

9. Annex B – responses to BCAP’s original proposal

This is a summary of significant points made for and against BCAP’s original proposal on PCAS. BCAP and Ofcom will take these comments into account when they determine if and in what the form the proposed rule is to be introduced in the UK Code of Broadcast Advertising. Stakeholders are encouraged to respond to this statement if their views are not reflected here.

Summary of responses in favour of the previous version of BCAP’s proposal:

- Advertisements for post-conception advice services will provide valuable information to those who may not be able to access it by other means.
- Advertisements for post-conception advice services will provide valuable information to vulnerable women.
- Post-conception advice services & abortion are legally available and should be entitled to advertise.
- Women need relevant information at an early stage.
- Welcome the commitment to follow through on recommendations of the Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967.
- Anti-choice organisations not only delay women who are considering or seeking abortion services but in some case mislead women with false information about abortion, including making exaggerated or false claims about the risks associated with abortion. This does not simply delay women accessing abortion services but can actually deter women from seeking an abortion thereby curtailing their ability to make their own choices.
- The proposals are in the interests of the safety, health and well-being of all women and children in our society.
- There is no legitimate reason why those who provide this basic healthcare service, to which women have a fundamental right to access, should be prevented from advertising their services. Women have been able to access safe and legal abortions from the NHS or privately for over 40 years.
- It is important to take a responsible attitude towards teenage sexual behaviour in light of teen pregnancy and STD rates.
- Women are entitled to know the type of organisation from whom they are seeking help.
- Permitting such advertisements on television and radio could provide valuable unbiased information to people of all ages living in communities where contraception and termination (and sexual health in general) are not discussed for cultural or religious reasons. Young people may not be getting the information they need from their schools and people of all ages may be getting it weighted with (religious) moral prejudice from their families and communities.
- It is critical that advertisements for post-conception advice services should be explicit about whether or not they refer women for abortion. This is particularly the case with teenagers who sometimes present later into pregnancy than women of other age groups, and sometimes lack the skills and knowledge to discern the difference between post-abortion services and can find themselves facing later and more complicated abortion procedures due to unnecessary delays caused by this confusion.
- There is no evidence to suggest family planning and abortion information and counselling cause serious offence to viewers or listeners in this country. We believe that a small, vocal minority of those who are opposed to both contraception and abortion make these claims to give validity to their wish to ban both, but never offer evidence of such offence among the public. It is possible to be personally opposed to abortion but also recognise that it will happen

in spite of such views and support the right of others to safe services.

Summary of responses against BCAP's proposal:

- BCAP's proposal will encourage promiscuity among young people and divorces sex from mature relationships. Any reduction in teenage pregnancy will only come about when society promotes the message of abstinence and self-control.
- This proposal is not the right way to improve sexual health.
- Such subjects should be dealt with at school and by parents.
- BCAP's proposal will promote abortion as a means of birth control.
- Advertisements for such services will cause serious offence to disabled people.
- Advertisements for such services will cause distress to women who are incapable of having children.
- There should not be a competitive market in the provision of abortion services.
- There is no evidence provided for the claim that pregnancy advisory services delay women accessing abortion. Pregnancy advisory services always refer women straight to their GP or a Family Planning Centre if a woman wishes to have an abortion.
- Those organisations wishing to promote healthy alternatives to abortion will not have a level playing field as their funding will be unable to match the money spent by the organisations promoting abortion advice and condoms.
- This is too serious a moral issue to be advertised in this commercial setting.
- The law in the UK does not permit abortion on demand, and there is no "right" to have an abortion. Abortion is illegal in the United Kingdom unless two doctors agree that the woman satisfies specific exemption criteria as laid out in the 1967 Abortion Act (as amended). To allow broadcast advertising of post-conception pregnancy advisory services which refer women for abortion would be to send a profoundly misleading message about the basis on which abortion is legally available.
- BCAP's proposals are in conflict with the Audio Visual Media Services principle that audiovisual commercial communications shall not cause moral detriment to minors or encourage behaviour that is prejudicial to health or safety.
- BCAP's proposal is in conflict with the Code's own provisions on political and controversial matters.
- The BCAP TV Code prohibits medical treatments and medicinal products available on prescription.
- To insist on a mandatory warning in advertisements for non-referring organisations is in effect benefitting abortion-referring organisations.
- The context, medium and impact of TV are highly different to that of radio.
- Pre-conception and post-conception services should be accessed by medical referral only.
- Abortion advertising would cause serious and widespread offence to UK citizens holding sincerely held religious beliefs on abortion.
- Abortion providers mislead women into thinking that abortion is a quick-fix solution to a

problem pregnancy with no harmful consequences.

- There are enough avenues open for women to seek out an abortion provider. Targeting them through the television when they are vulnerable is not the answer to our high abortion rate.
- Abortion is not legal in Northern Ireland and under its criminal law; it is illegal to advertise abortion providers in booklets, yellow pages etc. Television would also come under this aspect of the law.
- The advertising of such services will further trivialize the matter given that no serious treatment of the issues involved can be dealt with in a short advertisement. Advertising, rather, is typically aimed at increasing the market for services and therefore very likely to lead to a worsening of the situation of high abortion levels.
- There will be some services which are not anti-choice but which are unable to refer women for abortion because of the nature of their service, for example because they are nurse-led. There is a risk that requiring advertisements to state that these services do not refer for abortion could give the false impression that they are opposed to abortion or offer a more restricted range of assistance to women.
- Post-conception advice services should not be advertised on television if those advertisements are going to contain mention of 'abortion'.
- In line with BCAP's proposal, advertisements for those services which can refer women for a termination should be made to include a similar statement if they do not offer counselling to women who choose to keep their babies.
- Rather than require providers of post-conception pregnancy advice services to explicitly state if they do not refer women directly for abortion, there is a more pressing need for abortion providers to state the risk of post-abortion medical complications and psychological trauma when advertising their services. This would parallel the situation in the financial sector, where, such advertisements must include a warning that alerts the audience to the risks involved.
- Any woman considering abortion will be sufficiently motivated and will easily be to find information about abortion providers from the wide range of sources presently available – internet, print advertisements, women's magazines, yellow pages, radio etc.
- All post-conception advisory services should be required to make a statement about their referral practices. i.e. whether they will/will not refer women for a termination.